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Jay C. Carlisle II
Pace University School of Law, jcarlisle@law.pace.edu

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I. Introduction

This article analyzes recent developments in the statute of limitations case law under New York Civil Practice Law and Rules ("CPLR") Article II[1] and two related New York Court of Appeals decisions. Specifically, the article will examine the cases of *Bazakos v. Lewis*[2] and *Gotay v. Breitbart*.[3] In *Bazakos*, the Court of Appeals held that a claim against a doctor for his alleged negligence in performing an independent medical examination ("IME") was governed by the two-year and six-month medical malpractice statute of limitations.[4] In *Gotay*, the Court of Appeals held that the continuous representation doctrine did not toll the running of a three-year statute of limitations in a malpractice claim against a lawyer.[5] Both decisions demonstrate the Court of Appeals' adherence to a strict and rigid application of statutory time periods in favor of defendants and against plaintiffs.[6]

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* Jay C. Carlisle is one of the founding professors at Pace University School of Law. He is a Commissioner for the New York State Law Revision Commission, an elected Life Fellow of the American Bar Foundation, and a Referee for the New York State Commission on Judicial Conduct. Special thanks to Fallyn Reichert for all of her assistance.

1. *See* N.Y. C.P.L.R. 203 (McKinney 2004 & Supp. 2009). Article II of the CPLR contains the principle statutes of limitations in New York, although there are many others. N.Y. C.P.L.R. 201, at 2-6 to 21 (McKinney 2004). *See also* Jay C. Carlisle, *1991 Survey of New York Civil Practice*, 43 SYRACUSE L. REV. 77, 101-16 (1992).

2. Bazakos v. Lewis, 911 N.E.2d 847 (N.Y. 2009).

3. Gotay v. Breitbart, 912 N.E.2d 1056 (N.Y. 2009).

4. *Bazakos*, 911 N.E.2d at 847 ("We hold that a claim against a doctor for his alleged negligence in performing an independent medical examination (IME) is a claim for malpractice, governed by CPLR 214-a's two-year-and-six-month statute of limitations.").

5. *Gotay*, 912 N.E.2d at 1056 ("Plaintiff's legal malpractice claim was not brought within the applicable statute of limitations period, and defendants-appellants established as a matter of law that the continuous representation doctrine does not apply.").

6. It is common knowledge that New York's application of statutes of limitations is defendant-oriented. *See generally* OSCAR G. CHASE & ROBERT A. BARKER, CIVIL

II. Statutes of Limitations Generally

A statute of limitations is an arbitrary period of time within which an action must be commenced.[7] If a claim is not brought within the time provided, a defendant may assert the statute as a defense.[8] "Article 2 of the CPLR contains the principal statutes of limitations in New York, though there are many others."[9] The CPLR also includes two rules of general applicability, which are essential for analyzing statutes of limitations cases.[10] The first rule, CPLR 203(a), states that "[t]he time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed."[11] To determine if there is a time limit in an action, one must first determine which period set forth in CPLR 211-217 (or from another source) is relevant; then determine when the claim accrued; and finally, consider the effect of any applicable tolls or extensions.[12] The second rule, CPLR 201, states that, "[n]o court shall extend the time limited by law for the commencement of an action."[13] Thus, courts must often defer to the legislatures' judgment as written in the statute as to when a particular claim has expired.[14]

There are fundamental policy goals underlying statutes of limitations. These concerns include notions of fairness,[15] repose,[16] meritorious claims,[17] stale evidence,[18] and credibility.[19] Repose seems to be the paramount policy consideration in New York. This emphasis means that, as applied, New York's statutes of limitations are often defendant-orientated.[20] The general rule is that the statute starts to run

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LITIGATION IN NEW YORK § 7.01 (4th ed. 2002).

7. DAVID D. SIEGEL, NEW YORK PRACTICE § 33, at 41 (4th ed. 2005).

8. *See* N.Y. C.P.L.R. 3211(a)(5), 3018(b) (McKinney 2004 & Supp. 2009).

9. *See* CHASE, *supra* note 6, § 7.01.

10. *Id.*

11. N.Y. C.P.L.R. 203(a).

12. The claim is generally interposed when filed.

13. N.Y. C.P.L.R. 201.

14. *See generally id.*

15. *See generally id.*; SIEGEL, *supra* note 7, at 41. *See also* Blanco v. Am. Tel. & Tel. Co., 689 N.E.2d 506, 514 (N.Y. 1997).

16. Cubito v. Kreisberg, 419 N.Y.S.2d 578, 581 (App. Div. 1979), *aff'd*, 415 N.E.2d 979 (N.Y. 1980).

17. Victorson v. Bock Laundry Mach. Co., 335 N.E.2d 275 (N.Y. 1975).

18. *See, e.g.*, Labarbera v. N.Y. Eye & Ear Infirmary, 691 N.E.2d 617 (N.Y. 1998).

19. Nykorchuck v. Henriques, 577 N.E.2d 1026, 1029 (N.Y. 1991).

20. *See* cases cited *supra* notes 15-19.

when the wrong is committed, i.e., at the point where the right to sue is complete, regardless of whether the person wronged is aware of the fact.[21] However, the legislature may postpone the accrual to the date of discovery.[22] *Gotay* and *Bazakos* are legal and medical malpractice cases, respectively, where the Court of Appeals reversed lower court decisions denying defendants' motions to dismiss on statute of limitations grounds.[23] In both cases, the claims accrued, and the statute began to run, when the wrong was committed. In *Gotay*, the plaintiff argued that the three-year time limitation was not applicable because of the doctrine of continuous representation.[24] The Appellate Division for the First Department found the doctrine to be applicable,[25] but it was reversed by the Court of Appeals.[26] In *Bazakos*, the plaintiff's claim was commenced two-years and eleven months after it accrued.[27] The defendant moved to dismiss the case on the ground that it was barred by the two-year and six-month statute of limitations.[28] The plaintiff argued the claim was governed by a three-year general negligence statute, and was, therefore, timely.[29] The Supreme Court granted the defendant's motion, relying on an Appellate Division, Second Department decision, *Evangelista v. Zolan.*[30] When the plaintiff appealed, the Appellate Division overruled *Evangelista* and reversed the Supreme Court, holding that the claim was

21. *See generally* Ely-Cruikshank Co. v. Bank of Montreal, 615 N.E.2d 985, 986 (N.Y. 1993); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429-30 (N.Y. 1991). *See generally* N.Y. C.P.L.R. 201 (McKinney 2004); SIEGEL, *supra* note 7.

22. Blanco v. Am. Tel. & Tel. Co., 689 N.E.2d 506, 509 (N.Y. 1997).

23. *See* discussion *infra* Parts III.A-B.

24. Gotay v. Breitbart, 866 N.Y.S.2d 638, 640 (App. Div. 2008), *rev'd*, 912 N.E.2d 1056 (N.Y. 2009).

25. *Id.* at 640-41. The Appellate Division reversed the Supreme Court and applied the continuous representation doctrine, stating that "[i]f the attorney-client relationship has come to an end, that fact should be absolutely clear to all parties involved." *Id.* at 641. The Appellate Division found that where the entire course of litigation had been characterized by delay and lack of communication between client and counsel, the relationship was not severed and the statute of limitations tolled. *Id.* at 642.

26. Gotay v. Breitbart, 912 N.E.2d 1056 (N.Y. 2009). A unanimous Court of Appeals, without Chief Judge Lippman's participation, reversed the Appellate Division in a memorandum opinion. *Id.* (holding that "[o]n review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, with costs, motions for summary judgment by defendants-appellants granted and certified question answered in the negative. Plaintiff's legal malpractice claim was not brought within the applicable statute of limitations period, and defendants-appellants established as a matter of law that the continuous representation doctrine does not apply."). *Id.*

27. Bazakos v. Lewis, 911 N.E.2d 847, 848 (N.Y. 2009).

28. *Id.*

29. *Id.* at 849.

30. *Id.* at 848-49 (citing Evangelista v. Zolan, 669 N.Y.S.2d 325 (App. Div. 1998)).

not barred by the statute of limitations.[31] The Court of Appeals reversed, agreeing with the dissenting Justices in the Appellate Division, and barred the plaintiff's claim as untimely.[32]

III. Discussion

A. Bazakos v. Lewis

1. Background

Injuries sustained in a medical setting may, but usually do not, constitute ordinary negligence governed by the three-year, CPLR 214 general tort statute.[33] For example, in *Bleiler v. Bodnar*, the Court of Appeals unanimously held that claims against a hospital for failure to provide competent emergency room personnel and promulgate proper regulations were for claims of negligence and, therefore, subject to a three-year limitations period.[34] Plaintiff James Bleiler had visited the emergency room of Tioga General Hospital, seeking treatment for an eye injury.[35] An unidentified nurse took Bleiler's medical history and he was treated by Dr. Bodnar who failed to detect a metal fragment in Bleiler's right eye.[36] The doctor directed him to apply an ointment and wear an

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31. Bazakos v. Lewis, 864 N.Y.S.2d 505, 510 (App. Div. 2009).

32. Bazakos v. Lewis, 911 N.E.2d 847, 848-49 (N.Y. 2009). The Court explained that "[t]he Appellate Division majority concluded that, because the doctor performing an [independent medical examination] IME and the person undergoing it do not have a physician-patient relationship, the action was not 'for medical . . . malpractice' (C.P.L.R. 214-a) and was therefore governed by the three-year statute applicable to personal injury actions generally (C.P.L.R. 214[5]). The dissenting Justices, relying on *Evangelista* and *Twitchell v. MacKay*, 78 A.D.2d 125, 434 N.Y.S.2d 516 (4th Dept. 1980), argued that a 'limited' physician-patient relationship exists between the examining doctor at an IME and the person examined, and that the action should therefore be considered one for malpractice . . . ." *Id.*

33. *See* N.Y. C.P.L.R. 214 (McKinney 2004 and Supp. 2009). *See generally* N.Y. C.P.L.R. art. 2 (McKinney 2004 and Supp. 2009); SIEGEL, *supra* note 7.

34. Bleiler v. Bodnar (*Bleiler II*), 479 N.E.2d 230, 236 (N.Y. 1985). The Court of Appeals held that a patient's claims for negligent medical care were for medical malpractice. *Bleiler II*, 479 N.E.2d 230. The Court found that the claims were governed by a two and one-half year statute of limitations found in McKinney's C.P.L.R. 214-a. *Id.* However, the claims for failure to provide competent emergency room personnel and for failure to promulgate proper regulations sounded in negligence and were, therefore, subject to three-year statutes of limitations. *Id.*

35. Bleiler v. Bodnar (*Bleiler I*), 477 N.Y.S.2d 780, 781 (App. Div. 1984), *modified and aff'd*, 479 N.E.2d 230, 236 (N.Y. 1985).

36. *Bleiler II*, 479 N.E.2d at 231.

eye patch for three days.[37] The next day, Bleiler had surgery performed in a hospital and lost sight in his right eye.[38] Bleiler's action against the doctor, nurse, and hospital was commenced two days after the expiration of the two-year and six-month statute of limitations for medical malpractice.[39] His claims were against Dr. Bodnar for failure to make a proper inquiry regarding Bleiler's medical history and in his examination, care, and treatment of plaintiff.[40] The emergency room nurse was similarly negligent.[41] The hospital was charged with vicarious liability for the conduct of the doctor and nurse, for failure to provide plaintiff with competent doctors and nurses, for failure to promulgate rules and regulations regarding the treatment of emergency room patients with eye injuries, and for being otherwise negligent.[42]

Plaintiff's complaint was dismissed by the Supreme Court, holding that all of Bleiler's claims were governed by the two-year and six-month medical malpractice statute of limitations.[43] The Appellate Division modified, affirming as time-barred the dismissal of the causes of action against the doctor, and the hospital as vicariously liable, but reinstated the remaining causes of action.[44] The Appellate Division granted leave to appeal to the Court of Appeals and certified the following question: "Did this court err as a matter of law in reversing so much of Special Term's order as dismissed the direct causes of action against defendant hospital and nurse as well as the cause of action against defendant hospital for vicarious liability because of the negligence of its employee-nurse?"[45]

The Court of Appeals, speaking through Judge Judith S. Kaye, noted that prior to the adoption of the CPLR, actions for medical malpractice were governed by a two-year statute of limitations.[46] Thereafter, actions for all professional malpractice were subject to a three-year limitations period until 1975, when the Legislature responded to a crisis in the medical profession by shortening the statute to two-years and six-months.[47] The new legislation provided: "An action for medical

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure."[48] Unfortunately the statute did not define the term medical malpractice. The Court concluded that "Bleiler's claims for negligent medical care against the hospital directly, against the nurse directly, and against the hospital as vicariously liable for the conduct of the nurse, [were] for medical malpractice and therefore time-barred."[49] However, the Court stated, "Bleiler's claims against the hospital for failure to provide competent emergency room personnel and for failure to promulgate proper regulations, however are for negligence and thus timely."[50] The Court warned that "'Medical Malpractice' should not be read to exclude hospitals sued for negligent treatment rendered by their medical personnel. . . . Neither the statute itself nor the legislative history explicitly addresses the issue."[51] The Court continued by observing that the legislative intent was to minimize a perceived threat not only to physicians but to health care providers and, thus, nurses and other hospital personal "functioning in th[e] role as an integral part of the process of rendering medical treatment to a patient" could take advantage of the shorter limitations period.[52]

In *Scott v. Uljanov*, the Court of Appeals held that a hospital's alleged negligent supervisor of an intoxicated patient who fell from an emergency room bed should be characterized as medical malpractice instead of negligence.[53] Thus, the plaintiff's claim was questionable as

48. *Id.* at 232.

49. *Id.*

50. *Id.*

51. *Id.* at 232-33.

52. *Id.* at 234.

53. Scott v. Uljanov (*Scott II*), 541 N.E.2d 398 (N.Y. 1989). Plaintiff went to the hospital's emergency room with a .29 blood alcohol level and was subsequently placed in a hospital bed with the side rails up. *Id.* Some time later, plaintiff fell while attempting to climb out of bed and suffered a laceration to his head. *Id.* Almost three years later, plaintiff sued the owner of the hospital and Dr. Uljanov. *Id.* Three causes of action were dismissed as time-barred. *Id.* The fourth cause of action, against the hospital only, alleged plaintiff was negligently supervised while in the emergency room bed, resulting in his fall and head injury. *Id.* The Supreme Court dismissed this claim on the ground it was bound by CPLR 214-a, the two-year and six-month statute of limitations for medical malpractice actions. *Id.* A divided Appellate Division reversed. *Id.* The majority held that the claim sounded in negligence and was subject to a three-year limitations period under CPLR 214. Scott v. Uljanov (*Scott I*), 528 N.Y.S.2d 435, 437-38 (App. Div. 1988), *rev'd*, 541 N.E.2d 398 (1989). A unanimous Court of Appeals agreed with the Appellate Division dissenters that, for purposes of determining the applicable statute of limitations, defendant hospitals' alleged liability must be characterized as medical

to whether services provided by hospital staff constituted medical treatment.[54] The Court found that there was enough medical service to "bear[ ] a substantial relationship to the rendition of medical treatment . . . by a licensed physician."[55]

In *Weiner v. Lenox Hill Hospital*, the issue was whether plaintiff's complaint against a hospital that failed to properly safeguard its blood supply from HIV contamination sounds in medical malpractice or negligence for purposes of determining whether a two-year and six-month or three-year statute of limitations applies.[56] The Court noted "that the distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and 'no rigid analytical line separates the two.'"[57] The Court, speaking through Judge Ciparick, stated that "this Court has recognized that although a 'hospital in a general sense is always furnishing medical care to patients not every act of negligence toward a patient would be medical malpractice.'"[58] Judge Ciparick concluded that the gravamen of the plaintiff's claim was the hospital's inability to "adopt" and "prescribe" sufficient procedures and regulations for the collection of blood, which did not implicate questions of medical competence or judgment.[59] Thus the question, "whether the Hospital breached its duty to exercise due care in its blood collection activities d[id] not . . . depend on an analysis of the medical treatment furnished to Korn."[60]

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malpractice because the conduct at the hospital was an integral part of the process of rendering medical treatment to the plaintiff. *Scott II*, 541 N.E.2d at 398-99.

54. *Id.* The Court of Appeals considered the alleged wrongdoing committed by the hospital staff's failure to place the side rails up to prevent plaintiff's fall an "integral part of the process of rendering medical treatment." *Id.* at 399. The Court stated, "[c]onduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.'" *Id.*

55. *Id.*

56. Weiner v. Lenox Hill Hosp., 673 N.E.2d 914 (N.Y. 1996). Dale J. Korn was a patient at Lenox Hill Hospital from October 1984 through January 1985 and received numerous blood transfusions during his stay. *Id.* One of them was contaminated with the HIV virus and he contracted AIDS and died on June 20, 1990. *Id.* In March of 1991, plaintiff, as administrator of Korn's estate, brought a negligence claim against the hospital, which raised an affirmative defense that the claim was time barred under CPLR 214-a. *Id.* Plaintiff moved to strike the defense, which was granted by the Supreme Court because the claim sounded in negligence and not malpractice. *Id.* Both the Appellate Division and the Court of Appeals affirmed. *Id.* at 915.

57. *Id.* at 916 (quoting *Scott II*, 541 N.E.2d at 399).

58. *Id.* (quoting Bleiler v. Bodnar, 479 N.E.2d 230, 235 (N.Y. 1985)).

59. *Id.*

60. *Id.*

The Court of Appeals returned to the problem of defining medical malpractice in *Karasek v. LaJoie*, in which it held that actions against psychologists and other non-physician mental health professionals were not covered by CPLR 214-a.[61] The Court, speaking through Judge Titone, held that a claim of malpractice by a psychologist was not a "medical malpractice action" for limitations purposes, and instead was governed by a general three-year malpractice statute.[62] The Court reasoned that *Bleiler* had settled the question of who may be covered by the provisions of CPLR 214-a but stated, "the Court's holding in that case does not address the separate question of what categories of health-related activity constitute 'medical treatment' or bear a 'substantial relationship' to the rendition of such treatment."[63] The Court explained that the language of CPLR 214-a seemed simple but required courts to periodically grapple with what constitutes "'[a]n action for medical malpractice' as distinguished from one for ordinary negligence or another form of professional malpractice by a health care provider."[64] Thus, the Court deferred to the legislature for clarification and concluded that services provided by psychologists, however scientifically based they may be, were not medical services within the meaning of CPLR 214-a.[65] Finally, the Court was quick to note that its holding did not impair the rationale set forth in *Bleiler v. Bodnar* because, "in general, the *Bleiler* analysis cannot sensibly be applied to the field of mental health services—with its variegated diagnostic and treatment methods and its diverse group of independent practitioners."[66] Thus, the plaintiff's claim which was brought within three-years of the last date of treatment was timely and not barred by the shorter two-year and six-month period.

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61. Karasek v. LaJoie, 699 N.E.2d 889, 890 (N.Y. 1998).

62. *Id.* at 890. Plaintiff's action was commenced against a licensed psychologist more than two-years and six-months, but less than three-years after the last date of treatment. *Id.* The question before the Court of Appeals was whether plaintiff's claim was for medical malpractice, and therefore time-barred under CPLR 214-a, or for negligence under CPLR 214. *Id.* The Court "[c]onclud[ed] that the professional services rendered to plaintiff by defendant [ ] were not medical in character for purposes of determining the appropriate limitations period, we hold that the CPLR 214(6) three-year period . . . is applicable and that, consequently, the action is timely." *Id.* at 889.

63. *Id.* at 891.

64. *Id.* at 890.

65. *Id.* at 892.

66. *Id.*

2. IME Exams and the *Bazakos* Case

In *Bazakos v. Lewis*, the Court of Appeals, speaking through Judge Robert Smith, reversed the Appellate Division in a four to three decision.[67] The Court held that plaintiff's independent medical examination ("IME") is a claim for malpractice, governed by the two-year and six-month statute of limitations of CPLR 214-a.[68]

Plaintiff had brought a previous action arising out of an automobile accident.[69] In that action, he was required to undergo an examination by a doctor designated by the adverse party.[70] That doctor examined plaintiff and allegedly injured him when he "took plaintiff's head in his hands and forcefully rotated it while simultaneously pulling."[71] Bazakos filed his claim approximately two-years and eleven-months after the IME, and the defendant moved to dismiss on statute of limitations grounds. The trial court granted the motion, but the Appellate Division for the Second Department reversed, granting leave to appeal and certifying the question of whether its order was properly made. The Court of Appeals stated, "[w]e answer the question in the negative and reverse."[72] Judge Smith summarized the plaintiff's argument, which the Appellate Division accepted, as a simple one:[73] the fact that Bazakos was not the doctor's patient meant there was not a physician-patient relationship, which was essential to a cause of action in malpractice.[74] Judge Smith admitted there "is some logic to Bazakos's position, but the result he seeks would be an arbitrary one."[75] He agreed with the dissenting Justices at the Appellate Division that there was a "limited

67. Bazakos v. Lewis, 911 N.E.2d 847, 853 (N.Y. 2009).

68. *Id.* at 850. *See also* Rowe v. Wahnow, 891 N.Y.S.2d 584 (App. Term 2009). The Appellate Term described the "acronym" IME as having several meanings within the jurisprudence of New York. *Id.* at 586 (McKeon, P.J., dissenting). "The most common involves the typical personal injury lawsuit, where a party has, by virtue of statute and court rule (*see* CPLR 3102 (a); 22 NYCRR 202.17), the right to have an alleged injured person examined by a physician of one's choosing for purposes of providing testimony at trial, usually to place at issue the extent and severity of claimed injuries." *Id.* The Appellate Term went on to explain that "the independent prong of the term, has long been winked at by the bench and bar" because the exam is not independent but part of the adversarial process. *Id.*

69. *Id.* at 848.

70. *Id.*

71. *Id.*

72. *Id.* at 849.

73. *Id.*

74. *Id.*

75. *Id.*

physician-patient relationship," which meant that the general three-year statute of limitations for negligence could not apply.[76]

Chief Judge Lippman dissented. He observed that the complaint sounded in ordinary negligence and noted that, "it is plain that no medical treatment was intended or in fact provided. The exam was conducted simply as a disclosure device in litigation and, indeed, one whose benefit inured not to the examinee but to the examinee's adversary."[77] Chief Judge Lippman explained that there was no medical treatment rationale or application and that his analysis was entirely consistent with the purpose of CPLR 214's abbreviated limitations period.[78] He observed, "[the defendant] had no medical duty competently to diagnose, inform or, indeed, to treat the subject of his exam." This meant there was an extraordinarily limited scope of duty which was not worthy of a shorter limitation's period. Chief Judge Littman found the majority's embrace of the troubling notion that there may be medical malpractice in the absence of medical treatment as merely a form of words creating an exception for doctors hired to perform IME's when they are not statutorily entitled to the protection reserved to those engaged in the delivery of medical care and treatment.

The *Bazakos* decision is another example of the broad discretion courts have in the interpretation and application of arbitrary statute of limitations periods.[79] Arguably there was no medical treatment performed on the plaintiff who was required by his adversary to attend the independent medical examination. These exams are paid for and usually controlled by legal adversaries of the person being examined. They are not occasions for medical treatment, but are used to contest the examinee's claims and to question the need for any treatment at all. In fact, the American Board of Independent Medical Examiners has admonished the examiner to "advise the examinee that no treating physician-patient relationship will be established."[80] Furthermore, pursuant to the Court of Appeals' decision in *Weiner v. Lenox Hill Hospital*, the distinction between medical malpractice and negligence is a subtle one and clearly not every act of negligence towards a patient is

76. *Id.* at 850.

77. *Id.* at 851 (Lippman, C.J., dissenting).

78. *Id.*

79. *See generally* N.Y. C.P.L.R. art. 2 (McKinney 2004 and Supp. 2009); SIEGEL, *supra* note 7; CHASE, *supra* note 6, at § 7.05.

80. *See* American Board of Independent Medical Examiners, Guidelines of Conduct, http://abime.org/node/21 (last visited July 31, 2010).

medical malpractice.[81] In *Bazakos*, there was negligence and not malpractice because a doctor-patient relationship never existed.[82] Bazakos subjective state of mind was crucial. He was instructed by his counsel to attend the independent medical exam at the request of his adversary. If he did not attend he could be required to do so by court order. At the examination he did not believe his physical condition was being treated. This is similar to the fact pattern in *Payette v. Rockefeller University*, where the Appellate Division for the First Department held that medical procedures performed by physicians sounded in negligence and not malpractice because the patient was not seeking diagnosis or treatment but was participating in a study.[83] The same rationale applied to Bazakos, who did not seek medical treatment, but who attended the independent medical exam pursuant to a disclosure request by his adversary. There was no physician-patient relationship. Finally, a careful reading of CPLR 214-a indicates that it was never intended to apply to independent medical examinations.[84] The statute was created to provide limitations for certain forms of professional malpractice which are six months shorter than the ordinary personal injury statute. It was part of a package of legislation passed in 1975 in response to a crisis in the medical profession. The purpose of the legislative package was to enable health care providers to obtain malpractice insurance rates at reasonable prices. The statute was not intended to protect professionals who are not engaged in providing medical treatment to patients. The Court of Appeals made this clear in the *Weiner* and *Bleiler* decisions.[85] This precedent was not followed or distinguished by the *Bazakos* Court.[86]

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81. 673 N.E.2d 914 (N.Y. 1996).

82. *See* Korda v. Sosner, 2009 WL 2568180 (S.D.N.Y. Aug. 19, 2009).

83. 643 N.Y.S.2d 79 (App. Div. 1996). The Court held that since the plaintiff has not "alleged or relied upon the existence of a patient-physician relationship or asserted that [the defendant's] wrongful conduct constituted medical treatment or was substantially related to the same, her action does not sound in medical malpractice." *Id.* at 82.

84. *See* Spiegel v. Goldfarb, 889 N.Y.S.2d 45 (App. Div. 2009). The Court stressed that the distinction between conduct that may be negligence or malpractice depends on the nature of the duty defendant is alleged to have breached. *Id.* Thus, the negligence of a defendant is not medical malpractice unless it can be characterized as a "crucial element of diagnosis and treatment" and "an integral part of the process rendering medical treatment to the plaintiff." *Id.* at 47.

85. Weiner v. Lenox Hill Hosp., 673 N.E.2d 914 (N.Y. 1996); Bleiler v. Bodnar (*Bleiler II*), 479 N.E.2d 230, 236 (N.Y. 1985). *See also* Pacio v. Franklin Hosp., 882 N.Y.S.2d 247 (App. Div. 2009).

86. *See Korda*, 2009 WL 2568180. In resolving a similar issue, the Federal district court, citing *Bazakos v. Lewis*, explained that "New York courts have generally concluded that no patient-physician relationship arises from an IME" and stressed that the

B. Gotay v. Breitbart

1. Introduction

The CPLR imposes a three-year limitations period on "an action to recover damages for malpractice, other than medical, dental, or podiatric malpractice." This is true whether the claim is based in contract or tort.[87] Just as medical malpractice cases are subject to the continuous treatment doctrine, so are other forms of professional malpractice claims subject to the doctrine of continuous representation.[88] Under this doctrine, an action against a professional may be tolled until both parties to the relationship unequivocally understand that the relationship giving rise to the harm has terminated. The Court of Appeals explained the doctrine's rationale in *McCoy v. Feinman*[89] with respect to a claim for legal malpractice: "The continuous representation doctrine tolls statutes of limitations . . . where there is a mutual understanding of the need for further representation on the specific subject matter underlying the

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jurisprudence "where the claim derives from conduct during an IME, is evolving." *Id.* at *5 n.4. The *Bazakos* Court did not examine or cite cases referred to by Judge Daniels and thus left lower courts with a less than logical rationale as to why an IME negligence claim should be subject to a three-year negligence statute of limitations or a two-year-and-a-half medical malpractice statute of limitations.

87. *See* N.Y. C.P.L.R. 214(6) (McKinney 2004 and Supp. 2009); Chase Scientific Research, Inc. v. NIA Group Inc., 749 N.E.2d 161 (N.Y. 2001) (defining "professional" for non-medical malpractice statute of limitations purposes as excluding insurance agents and brokers); SIEGEL, *supra* note 7.

88. SIEGEL, *supra* note 7. *See also* Booth v. Kriegel (*Booth II*), 825 N.Y.S.2d 193 (App. Div. 2006). The lower court held that an accountant who prepared Federal and New York State income tax returns for plaintiff for each year from 1969 through 2001 could not face liability for mistakes he made in the tax returns for more than three years prior to the date plaintiff filed her claim for malpractice. Booth v. Kriegel (*Booth I*), 2005 WL 6234607 (N.Y. Sup. Ct. Nov. 28, 2005), *rev'd*, 825 N.Y.S.2d 193 (App. Div. 2006). The Appellate Division noted that because of the accountant's negligence, plaintiff unnecessarily paid social security taxes from 1985 through 1998 totaling about $150,000.00. *Booth II*, 825 N.Y.S.2d at 195. The lower court held that a "repeated use of an improper accounting method and the repeated failure to disclose the risks associated with the same," triggered the continuous representation doctrine. *Booth I*, 2005 WL 6234607. The First Department reversed the lower court, distinguished prior case law, and held that the Plaintiff could not benefit from the doctrine of continuous representation. *Booth II*, 825 N.Y.S.2d 193. The Appellate Division reasoned that plaintiff did not allege that the error in one year's tax return was the cause of the error in the return for the next year, only that the same error was repeated year after year. *Id.* Such repetition of the same error in preparing successive tax returns was, standing alone, insufficient to warrant application of the continuous representation doctrine. *Id.*

89. 785 N.E.2d 714 (N.Y. 2002).

malpractice claim."[90] The underlying purpose of the continuing representation toll is "to avoid undermining the continuing trust developing between a professional and his or her client or patient."[91]

Application of the doctrine requires that the plaintiff prove there is a professional relationship which pertains specifically to a matter in which there was malpractice. The specificity requirement is rigid. Thus, in *McCoy v. Feinman*, the Court of Appeals declined to apply the doctrine when the malpractice causing injury was the defendant's failure in connection with a specific stipulation and judgment and the parties did not contemplate further representation on that matter.[92] The Court distinguished the *McCoy* rationale in *Zorn v. Gilbert*, where a client sued her former attorney for negligence in handling a divorce case.[93] The Court, modifying a decision by the Appellate Division for the Second Department, reiterated that "[t]he continuous representation doctrine tolls the statute of limitations . . . where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim."[94] Therefore, even though the judgment of divorce in the underlying action was entered more than three years before commencement of the malpractice claim, defendant continued to represent the plaintiff in the matrimonial action for another seven months, making the commencement of her malpractice action within three years of that date timely under CPLR 214(6).[95] The Court also applied the doctrine in *Shumsky v. Eisenstein* against an attorney who had allowed his client's claim to languish until it was barred by the statute of limitations.[96] The Court stressed that the record established that the plaintiffs had a reasonable impression that the defendant attorney was, in fact, actively addressing their legal needs.[97] Similarly, in *Williamson v. PricewaterhouseCoopers LLP*,[98] the Court of Appeals, for the first time, analyzed the continuous representation doctrine in an accountant malpractice action. The action was brought more than three years after a number of audits had been completed and reviewed by the

90. *Id.* at 722.

91. Shumsky v. Eisenstein, 750 N.E.2d 67, 71 (N.Y. 2001). *See also* Jay C. Carlisle, *Civil Practice, 1988 Survey of N.Y. Law*, 40 SYRACUSE L. REV. 77, 116-17 (1989).

92. 785 N.E.2d 714 (N.Y. 2002).

93. 866 N.E.2d 1030 (N.Y. 2007).

94. *Id.* at 1031.

95. *Id.*

96. 750 N.E.2d 67 (N.Y. 2001).

97. *Id.*

98. 872 N.E.2d 842 (N.Y. 2007).

client. The Court did not apply the doctrine because the parties had entered into annual agreements for the provision of separate and discrete audit services.[99] The defendant performed each of them for a particular year and no further work for that year was undertaken.[100] The plaintiff demonstrated that there was a continuing professional relationship, but there was no course of representation with respect to the specific problems giving rise to the plaintiff's malpractice claim. Thus, there was not a mutual understanding between the parties as to the continuous representation doctrine.[101]

2. The *Gotay* Case

Plaintiff sought to recover for the malpractice of her former attorneys in connection with a medical malpractice action that she had filed.[102] The question was whether the legal malpractice action was time barred. The medical malpractice action arose from injuries plaintiff allegedly sustained in August of 1977, during her birth.[103] In early 1978, plaintiff's mother retained a law firm that commenced a malpractice claim in April of the same year.[104] After a long period of inactivity in the litigation, plaintiff substituted defendant Breitbart as her attorney.[105] Her case passed through a series of lawyers in connection with the defendant's law firm, and in 1998, plaintiff was advised that the lawyers could no longer represent her because an index number had not been filed.[106] The Appellate Division of the First Department, speaking through then-Presiding Justice Jonathan Lippman, rejected defendants statute of limitations defense and found plaintiff's claim timely because of the continuous representation doctrine.[107] Justice Lippman, relying on *Shumsky v. Eisenstein*,[108] explained that there was no indication in the record that defendants told plaintiff that their legal representation had definitely concluded.[109] Justice Lippman stated, "[t]here is no room for uncertainty on these matters, especially where, as here, attorneys deal

99. *Id.*
100. *Id.*
101. *Id.*
102. 866 N.Y.S.2d 638 (App. Div. 2009).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. 750 N.E.2d 67 (N.Y. 2001).
109. *Gotay*, 866 N.Y.S.2d at 641.

with laypersons unversed in the nuances and intricacies of legal practice and expression; what may seem crystal clear to a lawyer may be utterly lost upon the client. If the attorney-client relationship has come to an end that fact should be absolutely clear to all parties involved."[110] Presiding Justice Lippman reasoned that, absent CPLR 321, reasonable notice to the client when withdrawing from representation, the lawyer-client relationship had not ended.[111] He stressed that the Court of Appeals had made it clear that the attorney-client relationship be set down clearly and that an attorney must provide reasonable notice to the client when withdrawing from the representation to avoid causing the client to be misled and prejudiced.[112] Presiding Justice Lippman concluded that since the parties' expert witnesses disagreed as to whether the attorney-client relationship had ended, there were fact issues that warranted affirming the Supreme Court's decision to deny the defendant's summary judgment motion.[113]

Justice Friedman dissented in part because the plaintiff, in opposing defendants' summary judgment motion, had submitted no evidence to controvert defendant's contention that the lawyer-client relationship had ended.[114] He stated that "[t]he uncontroverted record evidence establishes that, here, plaintiff was 'informed' and 'put on notice' that the HHM defendants were withdrawing from her representation more than three years before she commenced this lawsuit."[115] Justice Friedman ignored defendant's failure to comply with CPLR 321[116] and called the majority's position "illogical" and "astonishing."[117] He concluded,

> [i]n sum, the inescapable conclusion is that plaintiff's attorney client relationship with defendants ended on January 28, 1999, at the latest, and any toll of the statute of limitations ended on that day as well. Thus, the action was untimely when plaintiff commenced it on

110. *Id.*

111. *Gotay*, 866 N.Y.S.2d 638.

112. *Id.*

113. *Id.*

114. *Id.* at 643 (Friedman, J., dissenting). However, the burden here is on the defendant and not the plaintiff.

115. *Id.* at 649.

116. CPLR 321 sets forth the required procedure for substitution of counsel. N.Y. C.P.L.R. 321 (McKinney 2004 & Supp. 2009).

117. Gotay, 866 N.Y.S.2d at 650 (Friedman, J., dissenting).

January 31, 2002, more than three years later.[118]

The Court of Appeals, without discussion or analysis, issued a brief memorandum opinion reversing the Appellate Division and dismissing the plaintiff's claim because it was time barred by the statute of limitations.[119] The Court did not distinguish *Shumsky v. Eisenstein*, did not analyze or clarify the continuous representation doctrine, and failed to provide guidance to the bench and bar as to when the doctrine should be applicable in legal malpractice cases. The Court restrictively applied the doctrine, adopting the Appellate Division's dissent, which used an objective standard for determining when the attorney-client relationship ends. This standard is contrary to the traditional subjective test used in professional responsibility matters.[120] In addition, the Court did not deal with the dissent's claim that that the Appellate Division majority had distorted the evidence and relied on reasoning not raised by the parties in their Appellate Briefs. Thus, the Court left the bench and bar with little guidance as to when the continuous representation toll should be applied in legal malpractice cases.

IV. Conclusion

The Court of Appeals' recent holdings in *Bazakos v. Lewis* and *Gotay v. Breitbart*, represent the Court's continued deference to considerations of repose, which usually benefit defendants. Statutes of limitations are enacted by legislatures and frequently are arbitrary and without rhyme or reason. The harsh results of applying these statutes to extinguish meritorious claims are sometimes ameliorated by the continuous representation doctrine and by classifying certain claims as negligence instead of medical malpractice. The extent to which courts fail to balance policy considerations of repose against fundamental notions of due process and fairness means that until the Legislature does so, many meritorious plaintiffs' claims will be dismissed because they are time barred.

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118. *Id.* at 651.

119. Gotay v. Breitbart, 912 N.E.2d 1056 (N.Y. 2009).

120. *See* Ilene Sherwyn Cooper, *The Relationship Between Attorney and Client*, 243 N.Y. L.J. 43 (Mar. 8, 2010) ("Because of the sanctity of the attorney-client relationship and the trust and confidence it naturally engenders, it is closely scrutinized by the courts in order to insure that no unfair advantage is taken by one party over the other….").